

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ROBERT A. WAMBOLT, JR.,

Plaintiff,

VS.

CAROLYN W. COLVIN,  
Commissioner of Social Security,

Defendant.

No. 2:13-CV-070-JTR

**ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF

Nos. 14, 21. Attorney David L. Lybbert represents Plaintiff; Special Assistant United States Attorney Courtney Garcia represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

## JURISDICTION

On December 14, 2009,<sup>1</sup> Plaintiff filed a Title II application for a period of disability and disability insurance benefits, along with a Title XVI application for supplemental security income, both alleging disability beginning December 7, 2009. Tr. 14; 133. Plaintiff reported that he could not work due to problems with

<sup>1</sup>The ALJ order indicates the filing date was December 9, 2009, but the SSA Administration Disability Report indicates the filing date was December 14, 2009. Tr. 14; 133,

1 his low back and the veins in his right leg. Tr. 137. Plaintiff explained that he is in  
 2 pain when sits, stands, walks and lifts objects. Tr. 137. Plaintiff's claim was  
 3 denied initially and on reconsideration, and he requested a hearing before an  
 4 administrative law judge (ALJ). Tr. 75-116. A hearing was held on October 18,  
 5 2011, at which medical expert Richard Allen Hutson, M.D., vocational expert K.  
 6 Diane Kramer, and Plaintiff, who was represented by counsel, testified. Tr. 35-74.  
 7 ALJ Marie Palachuk presided. Tr. 35. The ALJ denied benefits on December 7,  
 8 2011. Tr. 14-23. The instant matter is before this court pursuant to 42 U.S.C. §  
 9 405(g).

10 **STATEMENT OF FACTS**

11 The facts have been presented in the administrative hearing transcript, the  
 12 ALJ's decision, and the briefs of the parties and, thus, they are only briefly  
 13 summarized here. At the time of the hearing, Plaintiff was 50 years old, divorced,  
 14 and living in a house with his fiancé. Tr. 44; 163. Plaintiff completed the ninth  
 15 grade. Tr. 45.

16 Plaintiff testified he last worked as a certified nursing assistant, which  
 17 required him to lift, change, shower and clean patients. Tr. 47. Plaintiff testified  
 18 that he has also worked as a security officer, cashier and as a lawn care worker.  
 19 Tr. 48-49.

20 Plaintiff testified that he cannot work due to severe pain in his back and  
 21 shoulder. Tr. 53. He said his severe pain lasts "all day long, off and on." Tr. 54.  
 22 He also testified that in 2010, he was diagnosed with Diabetes and he uses an  
 23 inhaler for asthma. Tr. 58-59. Plaintiff prepares sandwiches and frozen meals,  
 24 washes dishes, regularly shops for food and clothing, reads books, watches  
 25 television and visits with friends. Tr. 163-67.

26 **STANDARD OF REVIEW**

27 The ALJ is responsible for determining credibility, resolving conflicts in  
 28 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,

1 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo,  
 2 although deference is owed to a reasonable construction of the applicable statutes.  
 3 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

4 The decision of the ALJ may be reversed only if it is not supported by  
 5 substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d  
 6 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a  
 7 mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way,  
 8 substantial evidence is such relevant evidence as a reasonable mind might accept  
 9 as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401  
 10 (1971). If the evidence is susceptible to more than one rational interpretation, the  
 11 court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at  
 12 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir.  
 13 1999). Nevertheless, a decision supported by substantial evidence will still be set  
 14 aside if the proper legal standards were not applied in weighing the evidence and  
 15 making the decision. *Brawner v. Secretary of Health and Human Services*, 839  
 16 F.2d 432, 433 (9th Cir. 1988). If substantial evidence exists to support the  
 17 administrative findings, or if conflicting evidence exists that will support a finding  
 18 of either disability or non-disability, the ALJ's determination is conclusive.  
 19 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

20 **SEQUENTIAL PROCESS**

21 The Commissioner has established a five-step sequential evaluation process  
 22 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
 23 16.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one  
 24 through four, the burden of proof rests upon the claimant to establish a *prima facie*  
 25 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This  
 26 burden is met once a claimant establishes that a physical or mental impairment  
 27 prevents him from engaging in his previous occupation. 20 C.F.R. §§  
 28 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the

1 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that  
 2 (1) the claimant can make an adjustment to other work; and (2) specific jobs exist  
 3 in the national economy which claimant can perform. *Batson v. Commissioner of*  
 4 *Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004). If a claimant cannot make an  
 5 adjustment to other work in the national economy, a finding of “disabled” is made.  
 6 20 C.F.R. §§ 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

#### 7 **ALJ’S FINDINGS**

8 At step one of the sequential evaluation process, the ALJ found Plaintiff has  
 9 not engaged in substantial gainful activity since December 7, 2009. Tr. 16. At step  
 10 two, the ALJ found Plaintiff suffered from the severe impairments of degenerative  
 11 disk disease of the lumbar spine, right shoulder impingement with possible partial  
 12 tear, diabetes and peripheral vascular disease, controlled. Tr. 16. At step three, the  
 13 ALJ found Plaintiff’s impairments, alone and in combination, did not meet or  
 14 medically equal one of the listed impairments. Tr. 17. The ALJ determined that  
 15 Plaintiff had the residual functional capacity (“RFC”) to perform light work with a  
 16 few limitations: he should not lift above shoulder height; he can occasionally  
 17 balance, stoop, kneel, crouch, crawl, and climb; he should change sit/stand  
 18 positions every hour for five minutes; and he should avoid concentrated exposure  
 19 to vibrations, unprotected heights and moving machinery. Tr. 18.

20 At step four, the ALJ found that Plaintiff is able to perform past relevant  
 21 work as a security guard, potato processor and cashier II. Tr. 22. The ALJ  
 22 specified that Plaintiff should not perform cashier work in a mini-mart, because it  
 23 would likely require more lifting than prescribed by Plaintiff’s RFC. Tr. 22.  
 24 Because Plaintiff could perform his past relevant work, the ALJ found that Plaintiff  
 25 was not disabled. Tr. 23.

#### 26 **ISSUES**

27 Plaintiff contends that the ALJ erred: (1) in his credibility determination; (2)  
 28 in weighing the medical evidence; and (3) in his Step Four determination. ECF No.

1 4 at 8.

2 **DISCUSSION**3 **A. Credibility**

4 Plaintiff argues that the ALJ erred by finding he had little credibility. ECF  
 5 No. 14 at 14-16. The ALJ is responsible for determining credibility. *Andrews*, 53  
 6 F.3d at 1039. Unless affirmative evidence exists indicating that the claimant is  
 7 malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear  
 8 and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). The ALJ's  
 9 findings must be supported by specific, cogent reasons. *Rashad v. Sullivan*, 903  
 10 F.2d 1229, 1231 (9th Cir. 1990). "General findings are insufficient; rather, the  
 11 ALJ must identify what testimony is not credible and what evidence undermines  
 12 the claimant's complaints." *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998),  
 13 quoting *Lester*, 81 F.3d at 834. If objective medical evidence exists of an  
 14 underlying impairment, the ALJ may not discredit a claimant's testimony as to the  
 15 severity of symptoms merely because they are unsupported by objective medical  
 16 evidence. See *Bunnell v. Sullivan*, 947 F.2d 341, 347-48 (9th Cir. 1991). First,  
 17 Plaintiff contends that the medical evidence supports his claimed limitations. ECF  
 18 No. 14 at 15. In finding Plaintiff had little credibility, the ALJ noted that "the  
 19 objective medical evidence did not support the level of limitation claimed," and,  
 20 "the claimant's subjective complaints are only partially credible since the medical  
 21 findings are so minimal for the level of limitations he alleged." Tr. 21-22.  
 22 Generally, conflicts between a Plaintiff's testimony of subjective complaints and  
 23 the objective medical evidence in the record can constitute specific and substantial  
 24 reasons that undermine credibility. *Morgan*, 169 F.3d at 600. "While subjective  
 25 pain testimony cannot be rejected on the sole ground that it is not fully  
 26 corroborated by objective medical evidence, the medical evidence is still a relevant  
 27 factor in determining the severity of the claimant's pain and its disabling effects."  
 28 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); see also *Burch v.*

1 *Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) ("Although lack of medical evidence  
 2 cannot form the sole basis for discounting pain testimony, it is a factor that the ALJ  
 3 can consider in his credibility analysis."); SSR 96-7p (the ALJ "must consider the  
 4 entire case record, including the objective medical evidence" in determining  
 5 credibility, but statements "may not be disregarded solely because they are not  
 6 substantiated by objective medical evidence").

7 As the ALJ found, the record does not support the Plaintiff's contention. In  
 8 this case, Plaintiff testified that his back pain was severe and prevented him from  
 9 sitting more than thirty minutes at a time and standing more than twenty to thirty  
 10 minutes at a time. Tr. 64-65. Plaintiff also said his back pain prevented him from  
 11 walking more than two blocks, and it caused his difficulty with bending at the 23  
 12 waist, stooping, crouching, climbing stairs, and shoulder pain prevented him from  
 13 reaching. Tr. 66-67.

14 The objective medical evidence revealed only mild impairments. For  
 15 example, on November 3, 2009, Plaintiff was examined by Jaime Dominguez-  
 16 Cespedes, M.D., who noted Plaintiff's x-rays revealed mild anterior osteophytosis.  
 17 Tr. 210. A subsequent x-ray performed on November 6, 2009, revealed Plaintiff  
 18 had mild degenerative changes in his lower back. Tr. 226-27. The January 19,  
 19 2010, x-ray of Plaintiff's shoulder revealed normal soft-tissues and structure. Tr.  
 20 244. A subsequent February 15, 2010, x-ray was also normal. Tr. 277. When  
 21 examined by Kim Nguyen, M.D., on February 15, 2010, Plaintiff showed no  
 22 noticeable asymmetry or muscle atrophy, swelling, and he had full range of motion  
 23 above his head in lateral abduction and forward extension. Tr. 275. Dr. Nguyen  
 24 reviewed the x-rays and concluded Plaintiff's x-rays were "grossly normal." Tr.  
 25 275. Similarly, an August 24, 2010, x-ray revealed mild degenerative changes in  
 26 Plaintiff's lumbrasacral spine. Tr. 348. As a result, contrary to Plaintiff's  
 27 assertions, the medical evidence does not support Plaintiff's allegations about the  
 28 severity of his impairment, and the ALJ did not err by finding the objective

1 medical evidence does not support the alleged severity of his limitations.

2 Plaintiff also argues that the ALJ failed to specify the daily activities that  
 3 contradicted his allegations. ECF No. 14 at 14-16. In determining whether the  
 4 claimant's testimony regarding the severity of the symptoms is credible, the ALJ  
 5 may consider the claimant's daily activities. *See, e.g., Fair v. Bowen*, 885 F.2d  
 6 597, 602-04 (9th Cir. 1989); *Bunnell*, 947 F.2d at 346-47. Although Plaintiff  
 7 makes a general assertion that his "very minimal" daily activities do not provide a  
 8 clear and convincing reason for discounting credibility, the record supports the  
 9 ALJ's finding that Plaintiff shops for himself, cooks, bathes, spends time with  
 10 friends, drives, works outside and exercises, and he can stand for 30 minutes and  
 11 walk for three blocks before stopping to rest. Tr. 22; 163-69; 210.

12 The record also supports the ALJ's observation that at the hearing, Plaintiff  
 13 testified that he could lift only "a couple of pounds at most," but elsewhere he  
 14 asserted he could lift up to 30 pounds. Tr. 22; 54; 168. Contrary to Plaintiff's  
 15 assertions, the ALJ provided specific activities that contradicted Plaintiff's claims  
 16 he was completely disabled, and the activities were supported by the record.  
 17 Plaintiff's contentions that the objective medical evidence supported his pain  
 18 complaints and his contention that the ALJ failed to specify the daily activities that  
 19 undercut his pain complaints are without merit. As a result, the ALJ provided clear  
 20 and convincing reasons supported by substantial evidence for discounting  
 21 Plaintiff's credibility.

22 **B. Medical Evidence**

23 Plaintiff contends that the ALJ erred by rejecting the medical provider  
 24 opinions from Kim Nguyen, M.D., Jaime Dominguez-Cespedes, M.D., Alan  
 25 Badgley, PT, and Bob Ebel, PA-C . ECF No. 14 at 9-14. As a general rule, more  
 26 weight is to be given to the opinion of a treating source than to the opinion of  
 27 doctors who do not treat the claimant. *Lester*, 81 F.3d at 830. If the treating  
 28 physician's opinion is not contradicted, it may be rejected only for "clear and

1 convincing" reasons. *Id.* Where the treating physician's opinion is contradicted by  
 2 another doctor, the ALJ may not reject the opinion without providing "specific and  
 3 legitimate reasons" supported by substantial evidence. *Id.* An ALJ may discredit  
 4 treating physicians' opinions that are conclusory, brief, and unsupported by the  
 5 record as a whole or by objective medical findings. *Batson*, 359 F.3d at 1195.

6 **1. Kim Nguyen, M.D.**

7 Plaintiff asserts the ALJ failed to provide a valid reason for rejecting the  
 8 opinion from Kim Nguyen, M.D., who indicated that Plaintiff was limited to  
 9 sedentary work. ECF No. 14 at 10-11. Specifically, Plaintiff complains that  
 10 substantial medical evidence, including the doctor's own treatment notes, support  
 11 Dr. Nguyen's opinion that Plaintiff was limited to the sedentary exertion level and,  
 12 thus, he did not simply rely upon Plaintiff's self-reports. ECF No. 14 at 12.

13 On April 28, 2010, Dr. Nguyen examined Plaintiff and completed a Progress  
 14 Note that included a fill-in-the-box form with severity ratings. TR. 294-95. Dr.  
 15 Nguyen found that Plaintiff's right shoulder impairment, back impairment, and  
 16 hyperthyroidism would cause moderate restrictions in Plaintiff's work activities,  
 17 and Plaintiff's Type II Diabetes would cause mild restriction. Tr. 294. Dr.  
 18 Nguyen opined that Plaintiff was limited to sedentary work level, and he estimated  
 19 that Plaintiff's condition would last six months. Tr. 295.

20 Six months later on October 22, 2010, Dr. Nguyen again completed a check-  
 21 the-box form and this time opined that Plaintiff would be moderately restricted in  
 22 work activities by his back pain and shoulder impingement and mildly restricted by  
 23 his hyperthyroidism and Type II Diabetes. Dr. Nguyen concluded Plaintiff's  
 24 overall work level was sedentary and his limitations could be expected to last for  
 25 six months. Tr. 310.

26 The ALJ assigned "very little weight" to the April 2010, opinion from Dr.  
 27 Nguyen because it contained "few objective findings" and was "inconsistent with  
 28 his previous and ongoing findings." Tr. 20-21. The ALJ assigned very little

1 weight to the October 2010, opinion from Dr. Nguyen, in part because the report  
 2 appeared “largely based upon claimant’s self-reported symptoms,” the form was a  
 3 check-the-box form, and contained “very few objective findings.” Tr. 21.

4 An ALJ may properly reject a treating physician’s opinion that is conclusory  
 5 and unsupported by clinical findings, particularly check-the-box style forms. See  
 6 *Batson*, 359 F.3d at 1195 (ALJ did not err in giving minimal evidentiary weight to  
 7 the opinions of the plaintiff’s treating physician where the opinion was in the form  
 8 of a checklist, did not have supportive objective evidence, was contradicted by  
 9 other statements and assessments of the plaintiff’s medical condition, and was  
 10 based on the plaintiff’s subjective descriptions of pain); *Crane v. Shalala*, 76 F.3d  
 11 251, 253 (9th Cir. 1996) (ALJ permissibly rejected psychological evaluations  
 12 because they were check-the-box reports that did not contain explanations of the  
 13 bases of their conclusions). Also, a physician’s opinion may be rejected if it is  
 14 based on a claimant’s subjective complaints which were properly discounted.  
 15 *Tonapetya v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001).

16 The record supports the ALJ’s reasons for discounting Dr. Nguyen’s  
 17 sedentary assessment. Neither the April nor the October 2010, check-the-box form  
 18 contains significant notations explaining Dr. Nguyen’s observations, ratings or  
 19 conclusions. Tr. 294; 309. The chart notes from both office visits lack any  
 20 indication that Dr. Nguyen performed a physical exam, and the notes also lack  
 21 observations of functional limitations, or evidence the doctor tested Plaintiff’s  
 22 limbs for range of movement, or performed palpitations to determine the location  
 23 of the pain. Tr. 293-95; 308-11. In the absence of an explanation from Dr.  
 24 Nguyen regarding the reasoning for a sedentary rating, and in the absence of any  
 25 apparent examination supporting the rating, the ALJ did not err by giving little  
 26 weight to Dr. Nguyen’s assessment.

27 Finally, the probative value of Dr. Nguyen’s opinion is questionable. Both  
 28 opinions indicated that Plaintiff’s limitations could be expected to last only six

1 months. Tr. 295; 310. In order to be deemed disabled, a disability must have  
2 "lasted or be expected to last for a continuous period of not less than 12 months."  
3 20 C.F.R. § 416.905(a). As such, the limitations assessed by Dr. Nguyen are not  
4 material in determining whether Plaintiff was disabled. The ALJ did not err in  
5 weighing the opinion of Dr. Nguyen.

6 **2. Jaime Dominguez-Cespedes, M.D.**

7 Plaintiff contends that the ALJ erred by rejecting Dr. Dominguez-Cespedes'  
8 opinion that Plaintiff could perform less than light work, and was limited to the  
9 light-to-sedentary work range. ECF No. 14 at 12-13. In November and December  
10 2009, Dr. Dominguez-Cespedes provided Plaintiff with two forms that contained  
11 recommendations for limiting Plaintiff's activities. Tr. 247; 253. The November  
12 25, 2009, Medical Release from Work or School form indicated Plaintiff was  
13 limited to 30 minutes off sitting, standing, and walking. Plaintiff was not to lift  
14 more than 30 pounds total. Tr. 247. On December 16, 2009, Dr. Dominguez-  
15 Cespedes met with Plaintiff and completed a DSHS Physical Evaluation Form, and  
16 produced a typed Progress Note. Tr. 220-21; 251-54. The typed note indicated  
17 that at that time, Plaintiff worked as a caregiver for patients at a facility. The note  
18 also indicated Plaintiff's work activities should be limited to 30 minutes of sitting  
19 and standing, and he should not walk for more than 50 minutes or lift more than 25  
20 pounds, he should allow frequent changes in position, avoid bending and stooping  
21 and avoid overhead use of his arms. Tr. 220. The handwritten DSHS form  
22 indicated the same restrictions, except the restriction for walking was limited to 15  
23 minutes. Tr. 253.

24 The ALJ assigned "some weight" to the opinion from Dr. Dominguez-  
25 Cespedes. Tr. 20. The ALJ noted that a discrepancy existed between the typed  
26 chart note indicating Plaintiff was limited to "no more than 50 minutes of walking"  
27 and the handwritten DSHS form indicating Plaintiff was limited to 15 minutes of  
28 walking. Tr. 20; 220; 253. The ALJ indicated that except for the discrepancy, the

1 remaining opinions appeared consistent with the totality of the record and  
2 generally consistent with the residual functional capacity, and thus were given  
3 some weight. Tr. 20.

4 Plaintiff argues that the ALJ erred by rejecting Dr. Dominguez-Cespedes'  
5 opinion that Plaintiff could walk no more than 15 minutes. ECF No. 14 at 13. The  
6 ALJ's reason that the limitation was contrary to the weight of the record was a  
7 valid reason, and was supported by the record. See, *Batson*, 359 F.3d at 1195 (ALJ  
8 properly rejects treating physicians' opinions that are unsupported by the record as  
9 a whole).

10 Plaintiff also argues that the ALJ gave no reason for rejecting Dr.  
11 Dominguez-Cespedes' opinions that Plaintiff could not sit or stand for more than  
12 thirty minutes, would have to change positions frequently, and should avoid  
13 bending or stooping. ECF No. 14 at 13. The RFC indicated Plaintiff could  
14 perform light work with restrictions on lifting above shoulder height; occasional  
15 balancing, stooping, kneeling, crouching, crawling, and climbing; change sit/stand  
16 positions every hour for five minutes; and avoid concentrated exposure to  
17 vibrations, unprotected heights and moving machinery. Tr. 18. While the RFC and  
18 Dr. Dominguez-Cespedes' findings are not identical, the doctor's limitation areas  
19 are generally incorporated into and generally consistent with the RFC. An ALJ's  
20 findings need only be consistent with, not identical to, a doctor's assessed  
21 limitations. *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1271, 1223 (9th Cir. 2010).

22 Finally, the probative value of this opinion in the DSHS form is  
23 questionable. In the December 16, 2009, form, Dr. Dominguez-Cespedes indicated  
24 that Plaintiff's limitations could be expected to last 4-6 months. Tr. 254. In order  
25 to be deemed disabled, a disability must have "lasted or be expected to last for a  
26 continuous period of not less than 12 months." 20 C.F.R. § 416.905(a). As such,  
27 the limitations assessed by Dr. Dominguez-Cespedes in the December DSHS form  
28 are not material in determining whether Plaintiff was disabled. Thus, the ALJ did

1 not err in weighing the opinion of Dr. Dominguez-Cespedes.

2       **3. Alan Badgley PT**

3 Plaintiff contends that the ALJ erred by dismissing the opinion of Alan  
 4 Badgley, that indicated Plaintiff should break up his sitting posture at least every  
 5 15 to 30 minutes. ECF No. 14 at 14. On April 1, 2010, Alan Badgley, PT,  
 6 entered chart note discharging Plaintiff from physical therapy because he had  
 7 reached “maximum rehab potential.” Tr. 284. Mr. Badgely instructed Plaintiff to  
 8 break up his posture – seated in front of a computer – “as often as possible, at least,  
 9 every 15 to 30 minutes.” Tr. 284. The RFC reflected that Plaintiff should change  
 10 a sit/stand positions every hour for five minutes. Tr. 18. It is not clear that Mr.  
 11 Badgley’s posture change instruction arises to a functional limitation instead of a  
 12 recommendation. A recommendation from a medical provider is distinguished  
 13 from an imperative and thus need not be adopted by the ALJ when an appropriate  
 14 alternative is available. *Carmickle v. Comm'r, SSA*, 533 F.3d 1155, 1165 (9th Cir.  
 15 Or. 2008). Regardless, the RFC reflected Plaintiff should change his posture at  
 16 least once per hour and this is reasonably consistent with Mr. Badgley’s instruction  
 17 that Plaintiff change positions every fifteen to thirty minutes. Because the ALJ  
 18 incorporated periodic postural changes into Plaintiff’s RFC, the failure to  
 19 specifically adopt Mr. Badgley’s recommendation is not error.

20       **4. Bob Ebel, PA-C**

21 Plaintiff argues that the ALJ failed to give any reasons for rejecting Mr.  
 22 Ebel’s opinion. ECF No. 14 at 14. On October 27, 2011, Mr. Ebel completed a  
 23 form entitled Physician’s Statement. Tr. 357-58. In the form, Mr. Ebel provided  
 24 five dates from 2008-2011 that Plaintiff refilled his inhaler prescription. Tr. 357.  
 25 He also stated that Plaintiff’s asthma was mild to moderate depending upon the  
 26 season and he indicated Plaintiff should avoid exposure to fumes, cleaners,  
 27 detergents, gases, dust, and extreme temperatures. Tr. 357.

28       An ALJ must give reasons germane to "other source" testimony before

1 discounting it. *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir. 1993). While "other  
 2 source" opinions are considered in establishing the severity of an impairment and  
 3 how it affects the ability to work, such a source may not establish the existence of a  
 4 medical impairment. See 20 C.F.R. §§ 404.1513, 416.913. Moreover, an ALJ  
 5 may discredit medical opinions that are conclusory, brief, and unsupported by the  
 6 record as a whole, or by objective medical findings. *Batson*, 359 F.3d at 1195.  
 7 Contrary to the Plaintiff's assertions, the ALJ provided reasons for rejecting Mr.  
 8 Ebel's opinion. Tr. 17. The ALJ noted that Mr. Ebel, a physician's assistant, is  
 9 not an acceptable medical source, the form lacked objective findings, and his  
 10 opinions were inconsistent with the overall record. Tr. 17. All three of the ALJ's  
 11 reasons constitute germane reasons that are supported by the record. Thus, the  
 12 Plaintiff's arguments that the ALJ erred in weighing these medical opinions fails.

### 13 **C. Step Four**

14 The Plaintiff argues that the ALJ failed to conduct a proper Step Four  
 15 assessment. ECF No. 14 at 16-20. At step four, the ALJ makes RFC findings and  
 16 determines if Plaintiff can perform past relevant work. Although the burden of  
 17 proof lies with the claimant at step four, the ALJ still has a duty to make the  
 18 requisite factual findings to support his conclusion. SSR 82-62. This is done by  
 19 examining the "residual functional capacity and the physical and mental demands"  
 20 of the claimant's past relevant work. 20 C.F.R. §§ 404.1520(a)(4)(iv) and 416.920  
 21 (a)(4)(iv).

22 An RFC is an "assessment of an individual's ability to do sustained work-  
 23 related physical and mental activities in a work setting on a regular and continuing  
 24 basis," i.e., for eight hours a day for five days a week, or an equivalent work week.  
 25 SSR 96-8p. Past relevant work is work performed in the last 15 years, lasted long  
 26 enough to learn it and was substantial gainful employment. SSR 82-61.

27 First, Plaintiff contends that the ALJ failed to include all of the Plaintiff's  
 28 limitations in his RFC. Specifically, Plaintiff argues that the ALJ erred by failing

1 to incorporate limitations related to Plaintiff's asthma and postural and reaching  
 2 limitations. ECF No. 14 at 17-18. Simply reasserting Plaintiff's argument that the  
 3 RFC was deficient because it did not reflect all his functional limitations, fails to  
 4 establish error at step four. See *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175-  
 5 76 (9th Cir. 2008). As addressed previously, the ALJ's reasons for rejecting the  
 6 single medical record from physician assistant Bob Ebel were germane and  
 7 supported by the record, and as a result, the ALJ did not err by failing to include in  
 8 Plaintiff's RFC limitations related to asthma. Similarly, the slight differences in  
 9 the medical opinions related to Plaintiff's limitations in his ability to sit, stand and  
 10 walk were previously addressed, and it was concluded that the ALJ did not err in  
 11 crafting the RFC.

12 Second, Plaintiff argues that the testifying medical expert opined "that even  
 13 lifting at shoulder level could be problematic." ECF No. 14 at 18. However, the  
 14 record does not support Plaintiff's recitation of the facts. Dr. Hutson clarified his  
 15 answer to indicate Plaintiff should not lift above shoulder level:

16       A. I would have no problem saying that he should do no lifting  
 17 with the elbow above shoulder level, and that he could work  
 18 with his elbows in close to his body without difficulty.

19       Q. All right. But even lifting at shoulder level may be problematic,  
 20 as well, wouldn't you agree?

21       A. Yes.

22       Q. All right.

23       A. He should – well, sure. But specifically, not to lift  
 24 anything with the elbow above shoulder level, would be my main  
 25 limitation.

26  
 27 Tr. 42. Based on these facts, the ALJ's conclusion that Plaintiff was restricted  
 28 from reaching above his shoulder is supported by the record, and Plaintiff's

1 argument fails.

2       Third, Plaintiff argues that the ALJ failed to identify the specific demands of  
 3 Plaintiff's past relevant work and compare those with his specific limitations. ECF  
 4 No. 14 at 18. At step four of the sequential analysis, the claimant has the burden to  
 5 prove that he cannot perform his prior relevant work either as actually performed  
 6 or as generally performed in the national economy. *Carmickle*, 533 F.3d at 1166.  
 7 "Although the burden of proof lies with the claimant at step four, the ALJ still has  
 8 a duty to make the requisite factual findings to support his conclusion." *Pinto v.*  
 9 *Massanari*, 249 F.3d 840, 844 (9th Cir. 2001). The ALJ must make "specific  
 10 findings as to the claimant's residual functional capacity, the physical and mental  
 11 demands of the past relevant work, and the relation of the residual functional  
 12 capacity to the past work." *Id.* at 845; SSR 82-62. "A vocational expert or  
 13 specialist may offer relevant evidence within his or her expertise or knowledge  
 14 concerning the physical and mental demands of a claimant's past relevant work,  
 15 either as the claimant actually performed it or as generally performed in the  
 16 national economy." 20 C.F.R. § 404.1560(b). The vocational expert merely has to  
 17 find that a claimant can or cannot continue his or her past relevant work as defined  
 18 by the regulations. See *Villa v. Heckler*, 797 F.2d 794, 798 (1986) ("the claimant  
 19 has the burden of proving an inability to return to his former type of work and not  
 20 just to his former job.")

21       Plaintiff argues, in essence, that the vocational expert ("VE") was incorrect,  
 22 and Plaintiff is unable to perform any of his past work. ECF No. 14 at 18-19. In  
 23 this case, the vocational expert described Plaintiff's prior work history, identified  
 24 each position including its exertional level and Specific Vocational Preparation  
 25 ("SVP") rating. TR. 71. The ALJ provided the VE with a hypothetical worker  
 26 matching Plaintiff's RFC, and the VE opined that Plaintiff could perform some,  
 27 but not all of his previous jobs. Tr. 72-73.

28       Contrary to Plaintiff's contention, the ALJ did make specific findings of fact

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY  
 JUDGMENT - 15

1 regarding Plaintiff's past relevant work. The ALJ relied upon the vocational  
 2 expert's testimony about the applicable DOT definitions and SVP ratings of  
 3 Plaintiff's past work including security guard, potato processor, and cashier II. Tr.  
 4 22. The ALJ compared Plaintiff's RFC with the definitions from the DOT and  
 5 concluded that Plaintiff is able to perform his previous work as it is generally  
 6 performed. Tr. 22. The ALJ relied upon the vocational expert's testimony that a  
 7 hypothetical individual with Plaintiff's RFC would be capable of performing  
 8 Plaintiff's past work, except that he should not work as a cashier in a mini-mart.  
 9 Tr. 22. As such, the Court concludes that the ALJ provided specific findings of  
 10 fact as to the physical and mental demands of Plaintiff's past relevant work and  
 11 properly concluded he had the residual functional capacity to perform such work.

12 **CONCLUSION**

13 Having reviewed the record and the ALJ's conclusions, this court finds that  
 14 the ALJ's decision is supported by substantial evidence and free of legal error.  
 15 Accordingly,

16 **IT IS ORDERED:**

17 1. Defendant's Motion for Summary Judgment, **ECF No. 21**, is

18 **GRANTED.**

19 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

20 The District Court Executive is directed to file this order, provide copies to  
 21 the parties, enter judgment in favor of defendant, and CLOSE this file.

22 DATED March 28, 2014.



A handwritten signature in black ink, appearing to read "JT".

23  
 24 JOHN T. RODGERS  
 25 UNITED STATES MAGISTRATE JUDGE  
 26  
 27  
 28